Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MORGAN WISE,

Petitioner,

v.

WANDA WISE FRYAR,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, Eleventh District, Eastland, Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the refusal to admit DNA evidence to correct a judicial decree finding of a parent-child relationship a violation of the Fourteenth Amendment when such DNA evidence refutes the paternity of the children which was decreed by judgment based on perjury, concealment and fraud of the wife.

2. Are the Fourteenth Amendment rights being denied to the children when a court of law refuses to correct a decree of parent-child relationship based on DNA evidence that has established the false finding of paternity and thus denying the children the right of genetic heritage, inheritance and legal rights from their biological father.

LIST OF PARTIES TO PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.6

Pursuant to Supreme Court Rule 14.1(b), Petitioner certifies that the names of all parties to this proceeding appear in the caption of the Petition for Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, MORGAN WISE, petitions for Writ of Certiorari to review the judgment of the Court of Appeals for the 11th District, Eastland, Texas. The Court of Appeals opinion is reported at 49 SW3rd 450 (Tex.App. Eastland, April 26, 2001, review denied). (Pet. App. at 2a). The trial court judgment affirmed by the Court of Appeals, was published.

For brevity, reference to the parties shall be designated as "Morgan" and "Wanda".

STATEMENT OF JURISDICTION

The judgment of the Texas Court of Appeals was entered on April 26, 2001. A Petition for Discretionary Review was timely filed in the Supreme Court of Texas on May 31, 2001.

The Supreme Court of Texas denied the petition for review on July 12, 2001. (Pet. App. at 1a). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AMENDMENT INVOLVED

Amendment Fourteen Section 1, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

This case concerns the fundamental and constitutional issue of fairness and a judgment entered pursuant to truth rather than perjury. Morgan obtained a divorce from Wanda on September 13, 1996. The Divorce Decree did not reflect a contest concerning the paternity of the three minor boys born during the marriage relationship. At no time did Morgan have any reason or cause to believe that the three minor boys were not his biological children. He did accuse Wanda of "running around" on him during the latter two years of the marriage all of which was subsequent to the birth of the boys. Wanda even testified under oath that she had never had extra-marital affairs during her marriage and that the children were born of Morgan.

Subsequent to the divorce, due to the fact that the youngest boy suffers from Cystic Fibrosis and that Morgan was not a carrier of the Cystic Fibrosis gene, DNA testing was performed and revealed that the three minor boys were not the biological children of Morgan. (Pet. App. at 34a, 36a and 38a). Morgan sought to set aside the finding of paternity

which was never litigated by a Bill of Review based upon the fraud and mis-representation exercised by Wanda upon Morgan. (Pet. App. at 16a). DNA evidence should be admitted to set aside the finding of paternity in the Divorce Decree. DNA evidence has set aside criminal convictions of innocent defendants and, likewise to deny subsequent DNA evidence in a civil proceeding is to deny Equal Protection of the law.

Morgan is under court order to pay child support for children that were not his biologically. Such order of child support was obtained through the conspiracy of Wanda and the biological father of the children, as well as, the perjury and fraud committed by Wanda in the court proceedings. The three minor boys have been denied rights to know or to attempt to ascertain the biological father in order that they may have the right to genetic history, inheritance, court recovery or governmental benefits should the same be warranted pursuant to social security laws. The three minor boys in effect have less rights than that of a illegitimate child who can inherit from his biological father and obtain genetic history, as well as, as an adopted child who likewise has the rights to inherit from its biological father. The three minor boys are thus denied Equal Protection of the law and Morgan is denied Due Process of law for the wrongfully taking of monies and support obligations obtained through fraud.

The Texas Court of Appeals and the Texas Supreme Court by denying discretionary review have fostered fraud and perjury by continuing to insist upon the finality of judgement even in light of the deception exercised by Wanda. The Texas courts have designated such fraud as being intrinsic fraud with the assumption that paternity was litigated in the divorce proceedings when in fact such litigation did not take place. The Texas courts in maintaining and condoning the legal myth of intrinsic fraud as opposed to extrinsic fraud results in judgments not representing the truth and fairness of

our system of judicial review of our society. Other states, sanctioned by the Supreme Courts of such states, refuse to follow this false myth which the Texas Courts follow. Such judgments are corrected to reflect the truth. Morgan and the three minor boys are denied the protection of the Fourteenth Amendment to the United States Constitution.

B. Factual Background

Morgan and Wanda were divorced on September 13, 1996. The Divorce Decree found that the Morgan and Wanda were the parents of the following children, Carli Ann Wise, Rowdi Morgan Wise, Marti Eugene Wise and Rauli Tabor Wise. Subsequent DNA testing by report dated March 18, 1999, established that Morgan's probability of paternity of the three boys was zero. (Pet. App. 34a, 36a, and 38a).

The minor child Rauli, was diagnosed with Cystic Fibrosis and Morgan was advised to obtain DNA testing to verify the paternity of the child as Morgan was not a carrier of the C.F. gene.

Wanda's testimony in a January 25, 1996 hearing, reflected that Wanda in answer to a direct question from her attorney, "have you ever had extra-marital affairs with any man during your marriage" and her answer was "no". (Pet. App. at 44a). Wanda testified that Morgan had four children and that the four children were his kids.

Contrary to this perjured testimony, on April 15, 1999, Wanda testified under direct examination that she had sexual relations with a Dwayne Alexander nine months prior to the birth of each of the three boys and that he could possibly be the father of each of them. Morgan at all times during the marriage believed that he was the father of all the children. Contrary to the Court of Appeals finding, Morgan was *not* aware that Wanda was having affairs with at least six men during their marriage in two different cities.

There was never any litigation as to the question of the paternity of the children, nor that he had any suspicion that she was seeing anyone. Morgan relied upon the trust and knowledge of his wife and the faith that he had for her during their marriage. Wanda always confirmed that the children were his and he relied upon this fiduciary relationship of truth.

At the Bill of Review hearing Morgan further re-iterated that he did not believe his ex-wife, Wanda, was seeing anybody in 1988 and 1990 and the first part of 1992 and the tail end of 1991 which would be the nine months prior to the birth of the three minor boys. Prior to the September 1996, Divorce Decree, he had no knowledge of her seeing anyone other than in the last two months of 1995 which was after the birth of the minor boys.

Morgan reserved his Constitutional issues at the Bill of Review hearing and reminded the Judge of the same as well as the fact that Morgan had a meritorious defense and that there was no fault upon his part. The Court limited the hearing to the fraud issues. Morgan preserved his Constitutional issues at a subsequent hearing on April 27, 2000 and his trial court pleadings preserved his Fourteenth Amendment Constitutional rights. (Pet. App. at 23a). Morgan sought to correct the finding of paternity in the Divorce Decree by way of a Bill of Review, individually and on behalf of the three minor boys in order that the true biological father of the children may be established and that true paternity be obtained. The trial court denied all relief.

1. *The Decision Below*

The Texas Court of Appeals subsequently reviewed the trial court's ruling and affirmed the trial court's denial of the Bill of Review and found that the fraud was extrinsic. The Texas Courts failed to recognize that even though a Divorce Decree states that there is a finding of paternity that it was

therefore assumed that the paternity of the children are litigated in every divorce proceeding. On the contrary, that is not reality. Paternity is not litigated for the reason that the husband in such divorces has no reason to dispute paternity of the children unless the wife either tells him that he is not the biological father or that he is incapable of fathering the children due to sterility. Texas courts imply that one must assume that if the wife at any time in the marriage even after the birth of the children had any type of extra-marital affair then therefore it must be assumed that the paternity of all children born of the marriage regardless of time would be suspect. The Texas Courts are in conflict with numerous states of the United States which recognize the truth of DNA testing.

The Texas Court of Appeals recognized the federal constitutional rights of Due Process and Equal Protection but stated that the denial of the Bill of Review was not a denial of these federally constitutional rights. (Pet. App. at 9a). The Texas Court of Appeals further denied any redress to the three boys by stating that the boys were not parties to the challenged decree and did not have standing. The effect of this ruling by the court forecloses actions by the boys to seek their constitutional rights the same as an illegitimate or adopted child and the rights to obtain inheritance and genetic history.

The Texas Supreme Court denied the Petition for Review with no opinion. (Pet. App. at 1a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The State Of Texas By Assuming That Ever Issue In A Divorce Decree Is Litigated Perpetrates A Fraud. Stating That The Decree Of Paternity Can Not Be Set Aside When Dna Evidence Establishes The Truth Of Paternity Sustains A Judgment Obtained Through Perjury, Deceiptfullness And Fraud In Violation Of The Fourteenth Amendment To The United States Constitution. The State Of Texas' Reliance Upon The Distinction Between Extrinsic And Intrinsic Fraud Conflicts With The Court Decisions And The Laws Of Other States. Other States Recognize That Finality Of Judgment And *Res Judicata* Do Not Bar The Setting Aside Of A Judgment Which Does Not Reflect The Truth.

The Texas Court of Appeals holding that the perjury and fraud committed by Wanda is intrinsic fraud and thus renders a judgment res judicata constitutes a travesty of justice. This ruling encourages and fosters deceiptfullness by a mother in a marriage relationship to lie and perjure herself in order to establish the presumed father of the children. If a wife can lie until a divorce decree is entered, she is thus protected by the courts to perpetuate the lie as to the alleged biological father of the children. The result is the wife/mother thus dictates the family relationship thus denying due process to the presumed biological father/husband and also denies her own children the right and knowledge of knowing their biological father for genetic and inheritance rights.

The Court of Appeals of Tennessee, *White v Armstrong*, 1999 WL 33085 (Tenn. Ct. App. January 27, 1999) recognized that the Petitioner over three years after voluntarily legitimizing the child had the right to terminate his responsibility to support the child based upon genetic testing which excluded him as the child's biological father. The Tennessee court recognized that the Petitioner was entitled to

post-judgment relief because it was no longer equitable that the legitimization order be given prospective application. The Court further recognized that the equitable principles conflicted with the policy of disfavoring re-opening cases after they have become final; the policy disfavoring granting relief to persons who come into court with unclean hands or who are responsible for their own misfortune; and the third policy requiring biological parents above anyone else to assume the responsibilities to support their children. The Court of Tennessee felt that the third policy that of requiring the biological parent to assume responsibility to support their children should take precedent over the first two conflicting policies. The Tennessee court cited their Rules of Civil Procedure that permits the court to relieve a party from final judgment when "it is no longer equitable that the judgment should have prospective effect".

The Tennessee Court recognized *DeFilippis v United States*, 567 Fed.2d 341, 343-44 (7th Cir. 1977) that this sort of relief is appropriate when a change of circumstances had occurred that would render continued enforcement of the judgment inequitable. The Tennessee Court further relied upon the statement of Justice Cordoza "a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong". *United States v Swift & Co.*, 286 U.S. 106, 114-15 (52 S.Ct. 460, 1932). The Tennessee court held that it is of overriding importance that one conclusively established in law not to be the father of a child be not declared as the father and to relieve a man from the prospective operation of a child support order when conclusive proof established that he was not the father of the child.

Denial of Due Process of Law and Equal Protection of law is being denied to Morgan by the continual enforcement of a judgment which was obtained wrongfully due to no fault upon

Morgan's part and being enforced through the Courts of Texas which do not recognize the equity principle as set down by the United States Supreme Court and the Courts of our sister states. The Supreme Court of the United States in *Lehr v Robertson*, 463 U.S. 248, 103 S.Ct. 2985, (1983) addressed the issues to be decided when the Fourteenth Amendment and the Due Process Clause is invoked. The Court stated that when this Clause is invoked it is the Court's practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. *Id.* 256. The Court must first consider the nature of the interest in liberty for which the Petitioner claims constitutional protection then address the adequacy of the procedure of the state in providing for such protection.

The Supreme Court has addressed the Due Process and Equal Protection laws in numerous cases primarily dealing with that of a biological father in the relationship to his children or the conflicting claims of two natural parents and the adoption by step-parents. The Court has traditionally reviewed the relationships between the children and the parents.

This case is a first impression of a presumed legal parent who is seeking to dis-establish such legal relationship due to a finding of non-genetic paternity. Important family relationship in this case has been destroyed by the acts of the wife/mother in her deceitfulness which has resulted in the injustice to Morgan and the three boys. The State of Texas is violating the Fourteenth Amendment by the enforcement of a legal relationship based on fraud and deceitfulness. The rights of Morgan are the reciprocal of that of a biological parent seeking relationship with his child. Morgan is entitled to such equal protection to dis-establish such a relationship as that of those seeking to establish a relationship.

The U.S. Supreme Court in *Lehr* further stated that the concept of equal justice under the laws requires the State to

govern impartiality. *Id.* 264. The State may not subject men and women to disparate treatment when there is no substantial relationship between the disparity and important purpose. Texas as well as the federal courts and other states recognize that DNA evidence may be admitted to overcome a criminal conviction. The admission of such DNA evidence in a criminal proceeding to correct an injustice is equal and comparable to the admittance of DNA evidence in a civil proceeding to set aside a finding of parent-child relationship when such biological relationships is an impossibility.

The Supreme Court of Wyoming has held that the doctrine of res judicata, collateral estoppel and judicial estoppel did not bar a trial court from granting relief from paternity. *State of Wyoming Dept. of Family Services, MJJ v PAG and MJA*, 934 P.2d 1257 (Wy.1997). The mother had told a putative father that he was in fact the father of an expected child. At the time of the delivery of the child he signed an affidavit acknowledging his paternity and a decree of paternity was entered. Within a year after the entry of the decree of paternity, the putative father filed his motion to set aside the finding of paternity based on the grounds of fraud and excusable neglect. The reasons for the mother's deception was her desire to protect the man she actually thought to be the father because he was married. The Department of Family Services of Wyoming urged that there was no sufficient showing of fraud or excusable neglect to support the finding for relief from the judgment of paternity. The Supreme Court reviewed the Rules of Civil Procedure which provided for relief from final judgment including fraud whether denominated as intrinsic or extrinsic fraud as a misrepresentation or other misconduct of the adverse party. The court found that the false representation did induce the putative father to execute the affidavit of acknowledgment of paternity because he reasonably believed it to be true and it was further reasonable to believe that the putative father did not contest the same until he was made aware of the facts to

the contrary. The putative father relied upon the false representations of the mother and upon discovery of the falsehood he acted diligently in seeking the reversal of the acknowledgement of paternity and relief of the court and the Supreme Court affirmed the trial court in vacating the judgment of paternity.

The Supreme Court of South Dakota recognizes that a judgment of paternity may be vacated and that the putative father may bring an action against the mother of the child seeking recovery of monies withheld from the putative father's wages for support of the child after the paternity judgment was vacated upon blood tests that established non-paternity. *Kohl v Amundson*, 620 NW2d 606 (S.D. Jan. 3, 2001). The Supreme Court held that the mother was statutory liable to the putative father for the monies withheld and further, in addition to the statutory provisions which entitled such relief, the putative father was entitled to recover under the principles of equity. It is a general principle of equity that one party shall not be enriched at the expense of another party. *AG Edwards & Son v Norwest Realty Co.*, 340 NW2d 187, 189 (S.D. 1983). Even with a default judgment declaring paternity to the putative father, the Court recognized the DNA blood test to vacate the judgment and allowed the current case to petition for reimbursement.

The Supreme Court of Nevada addresses the issue of fraud in decisions of paternity. The State of Nevada recognizes the finality of judgment similar to that of Texas. When a claim is fraudulently advanced and that fraud is so successful that the other party is not aware that he has a particular claim or defense, the court recognizes that this may be sufficient basis for an equitable relief from the judgment. *Love v Love*, 114 Nev. 572, 959 P.2d 523 (Nev. May 19, 1998). The court acknowledges the case law that which keeps one party away from court by conduct preventing a real trial on the issues is extrinsic fraud and forms a sufficient basis for equitable relief

from the judgment. *Libro v Walls*, 103 Nev. 540, 543, 746 P2d 632, 634 (Nev. 1987). In the *Libro* case the husband did not challenge the paternity during the divorce proceeding. The Court reversed the trial court which ruled that the husband could not raise nonpaternity as a defense to a judgment for child support arrearages. The Supreme Court noted that the wife's failure to notify the husband that he might not be the child's father prevented him from having a fair opportunity to litigate the paternity in the divorce proceedings.

In the *Love* case the husband did not challenge paternity in the original divorce proceeding. The Judgment would ordinarily be res judicata between the parties but the Supreme Court of Nevada held that res judicata did not bar the husband from proving non-paternity because of the possible presence of extrinsic fraud in the original proceeding. A genuine issue of material fact existed as to whether the wife fraudulently concealed the child's parentage. On remand, the district court must, as a threshold matter, determine whether the original judgment was procured by fraud.

Legislation has been passed by the State of Maryland authorizing the setting aside of paternity based upon genetic testing. The highest court of the State of Maryland in *Langston v Riffe v Langston, Daniel R. v Tyrone W.*, 359 Md.396, 754, A.2d. 389 (June 28, 2000) sustained the constitutionality of the statute to set aside or modify a paternity action if genetic testing established the exclusion of the individual named as the father. In addition to sustaining the statute, the Court further held that the best interest of the child standard has no place in a proceeding to reconsider a paternity declaration. The Court of Appeals of Maryland cited other state courts reflecting the remedial aspect of establishing the true paternity of a child and discussed the genetic inheritance and other rights of a child from a biological father.

Likewise, the Supreme Court of Alabama has recognized that the Alabama statute that allows an individual who has been declared the legal father to re-open the case if there is scientific evidence presented that such individual is not the father. *Jenkins v MAB and JB*, 723 So.2d 649 (Ala. July 17, 1998). The putated father executed an acknowledgment of paternity and paternity judgment became final in 1986. In 1995 the putative father invoked the statute of Alabama that allowed a previously adjudicate father who obtained blood test or DNA evidence indicating that he was not the biological father to re-open a final judgment of paternity. The question was raised as to the retroactive effectiveness of such statute and if the petition to re-open was filed within a reasonable time. The Supreme Court held that a 5 year limitation period did not bar the action to establish the non-existence of paternity and that a paternity judgment may be re-opened under a separate legislative rule. The putative father should be entitled to relief.

The Federal Rules of Civil Procedure Rule 60(b)(3) (Pet. App. 45a) recognizes that a court may relieve a party from a final judgment based upon fraud whether heretofore dominated as intrinsic or extrinsic and for any reason justifying relief from the operation of judgment. The District Court of the Virgin Islands *AP v Government of the Virgin Islands*, 961 F.Supp. 122 (April 2, 1997) recognized the relief under Rule 60(b)(6) (Pet. App. at 45a) according to United States Supreme Court in the case of *Kalpprott v United States*, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390-91 (1949) which stated that relief should be granted when "appropriate to accomplish justice". The District Court reversed the territorial court of the Virgin Islands which denied the putative father's motion to set aside a finding of paternity. The putative father obtained the results of a blood test which conclusively excluded the putative father as the child's father. He thereupon filed his motion for termination of support payments and the setting aside of the paternity judgment. The

District Court held that the territory court would be required to hold a full evidentiary hearing as to whether or not the father was entitled to relief from the judgment on grounds of extra-ordinary circumstances.

Even the Texas Supreme court has stated that a fiduciary concealment of material facts, used to induce an agreed or uncontested judgment which prevents a party from presenting at trial his legal rights is extrinsic fraud. *Montgomery v Kennedy*, 669 SW2d 309 (Tx.1984). Extrinsic fraud is that fraud which denies the losing litigate the opportunity to fully litigate his rights or defenses upon trial. *Id.* 312. The Court stated that the controlling question is always whether the alleged fraud prevented the party from knowing about and presenting his legal right at trial. *Id* 314. The *Montgomery* case reflected that a brother had failed to disclose the existence of an oil and gas lease. This lease constituted part of the assets which were being litigated between a brother and sister. The concealment of such lease constituted extrinsic fraud to the fiduciary relationship that the brother owed to his sister. The Court granted the Petitioner's Bill of Review.

Is not the pro-creation of children of a marriage at least equal to property rights in an estate dispute? The paternity of the children by Morgan was never litigated in the divorce proceeding and has not been subjected to cross-examination. For the Texas Courts to state that paternity was litigated by the findings in the divorce decree is not to accept reality.

The Texas Courts have held that the fiduciary exception to the technical requirement of extrinsic fraud for the purposes of a Bill of Review have become more prevalent with regard to the non disclosure of financial assets in an divorce. *Rothmill v Morrison* 732 SW2d 6 (Tx. Ct. App.-Houston, 1987, no writ); *Ragsdale v Ragsdale*, 520 SW2d 839 (Tx.Ct.App.- Ft. Worth, 1974, no writ). The concealment of marital property is considered extrinsic fraud for purposes of

Bill of Review even if the actual concealed matters were themselves contested and litigated.

Is not then the marriage relationship also a fiduciary one? The concealment of the parentage of Morgan's three sons is a breach of this fiduciary duty. Fraud exercised by Wanda is thus extrinsic fraud comparable to the concealing of marital property rights and the Due Process of law requires that Morgan obtain relief from the paternity judgment. The concealing of the true parentage of children is at least comparable to the concealment of marital assets in a divorce proceeding.

The States of Iowa and Ohio both enacted civil statutes wherein a putative father may bring an action to declare the non-existence of the parent-child relationship after adjudication of paternity in any judgment. (Iowa Code Chapter 600B, Paternity and Obligation for Support; Ohio Revised Code Chapter 3119.962 Relief From Final Judgment, Court Order, or Administrative Determination). These statutes rely upon the DNA evidence that states non-paternity. Texas has no such statutes but Morgan should not be denied relief from a finding of paternity even though the State fails to pass such statute when such paternity is based upon a judgment obtained through perjury, fraud and deceit.

The Texas Court of Appeals cited the Massachusetts Supreme Court *In re Paternity of Cheryl*, 746 NE2d 488 (Mass. April 24, 2001) by stating that this case reached the same result as the Texas case. The Massachusetts ruling is distinguishable as the putative father did not raise constitutional issues. Such putative father had signed a statement of paternity and had been offered DNA testing before acknowledging paternity but refused the same. He waited several years before challenging the paternity judgment and during such time by his own admission he had reason to believe that he was not the child's father. The putative father failed to even take action to set aside the paternity even when

the mother unequivocal confirmed that he was not the biological father.

The Massachusetts Court failed to set aside the finding of paternity judgment because of the consequences of the father's long delay to challenge such judgment. The Massachusetts Court did recognize *Dixon v Punchy*, 979 P.2d 520, 526 (Alaska 1999) wherein genetic tests confirm the father not the biological parent and that the claim was brought two and half years after the divorce which was not unreasonable as a matter of law to grant relief from prospective application of the Divorce Decree.

Morgan in contrast challenged his paternity judgment upon learning the results of the DNA testing. He had no knowledge of the possibility that he was not the biological father of the children and on the contrary, Wanda had at all times stated that he was the biological father. Morgan had no reason to perform DNA testing in 1996. Under Texas law and the majority of the laws of all states, the husband of a mother who has given birth to a child is considered the presumed biological father of such child. There is no doubt that the mother is the biological mother. The father is only presumed due to the fact that he is married to the mother. Is not the father of a marriage being denied Due Process of law and Equal Protection of the law by the establishment of such presumption? To overcome such presumption he must deny the paternity or as a minimum seek scientific testing to determine such paternity. The paternity should not be a burden solely placed upon the father. The mother does not face such burden for she is not required to designate or swear as to the father of her children. Thus, there is per se unequal treatment between the wife and the husband.

The Texas Supreme Court has discriminated against Morgan as a presumed biological father who seeks to set aside this finding of paternity as compared to a biological father who is found to have standing to rebut the marital pre-

sumption and to claim his parental rights by establishing his paternity. The Texas Supreme Court *In the Interest of J.W.T*, 872 SW2d 189 (Tx.1995) found that the biological father had standing to establish his paternity relationship with his biological children even though such children were born of a marriage. The Texas Supreme Court stated that "permitting the scientific truth about paternity to govern legal relationship between real people affected by court rulings promotes certainty and stability". *Id.* 194. The Court further stated that the state should not perpetuated the myth of "presumption of paternity" so as to deprive the biological father of being able to exercise his rights as a parent. *Id.* 197. The Texas Supreme Court and the Texas Court of Appeals in denying review are thus perpetuating this myth of paternity totally contrary to scientific principles and the truth and in violation of the U.S. Constitution.

The Court's do not want to disturb a family relationship. But if the family relationship is based upon fraud and deceit, the family relationship as defined by the court order does, not exist and if it does not exist then the marriage contract between the parties is void and the obligation of support of non-biological children should likewise be void. The obligation of child support and support of a non-biological child is separate and distinct from a relationship between someone who has possession or a strong relationship with the minor child. Such relationships are governed by other provisions of the Family Code and the bonding or paternal relationship between the parties may continue absence the child support being paid to the mother. The Court may foster a strong structure of emotional relationship between the father and the child but this relationship is obviously going to be jeopardized by the further obligation for the father to support that child financially knowing full well that the child is not his biological child. Further, forcing the non-biological father to pay for such child allows the true biological father to not be

responsible for his actions and such biological father avoids the obligation to support his pro-creation.

II. In Failing To Set Aside A Finding Of Paternity Which Does Not Exist In Fact Deprives The Children The Right To Determine Their Biological Father And Their Right To Obtain Genetic Heritage, Inheritance And Their Legal Rights From Such Biological Father. As The Texas Courts Have Established The Presumed Legal Father As The Father, There Is No Recourse For The Minor Children To Seek The Biological Father. Judgment Of Paternity Is Res Judicata To Any Further Actions And Bars The Actions Of The Minor Children.

Unless the decree of paternity in the divorce judgment between Morgan and Wanda is not set aside, Morgan is unable as next of friend of the minor children to proceed in a cause of action against their biological father.

In *Clark v Jeter*, 486 U.S. 456, 108 S.Ct. 1988, the Court held that in Pennsylvania law that an illegitimate child must prove paternity before seeking support within 6 years of the illegitimate child's birth is unconstitutional under the Equal Protection and the Due Process Clause of the Fourteenth Amendment. A legitimate child may seek support from the parent at any time and thus there was discrimination between a legitimate child and the illegitimate child. Under Texas law an illegitimate child or an adopted child may inherit from their biological father. The legitimate child of a marriage wherein the father is not the biological father of such child denies such legitimate child the right to inheritance and support from the biological father. As the legitimate child has a legal father and until the finding of paternity is set aside such legitimate child may not seek knowledge of the biological father, nor its rights from the biological father.

This violates the Equal Protection and Due Process clause of the Fourteenth Amendment.

The U.S. Supreme Court has likewise held unconstitutional to discriminate between illegitimate children and legitimate children. *Mills v Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549 (1982) and *Gomez v Perez*, 409 U.S. 535, 93 S.Ct. 872 (1973).

> "Choices about marriage, family life and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society", rights sheltered by the Fourteenth Amendment against the State's unwarranted, usurpation, disregard or disrespect".

M.L.B. v S.L.J., 519 U.S. 102, 117 S.Ct. 555, 564 (1996).

The best interest of the three boys is not being represented by Wanda or the ad litem for to do so would to disclose fraud and deceit exercised by Wanda. The Texas Supreme Court recognized the right of a child over the age of one to institute paternity action even though a statute stated that such action must be commenced before the child is one year of age. *Dickenson v Simpson*, 807 SW2d 726 (Tx. 1991). The Texas Supreme Court stated that such statute was unconstitutional in violation of the Equal Protection laws. The Texas Supreme Court further in *Purcell v Bellinger* 940 SW2d 599 (Tx. 1997), held that a child may establish paternity when the child's interest were not adequately pursued in a previous action that concluded in a final judgement.

The minor boys rights are not being protected by their mother and the Texas Court of Appeals in this case has failed likewise to protect such children by stating that they had no standing to contest the Bill of Review. The Austin Court of Appeals in *B.M.L. v Cooper*, 919 SW2d 855 (Tx. Ct. App.-Austin, 1996, no writ) stated that it has become more compelling as science and blood testing, with DNA screening becoming more precise and dispositive, that the establishment of paternity can outweigh the societal interest of finality of judgment. *Id.* 861. The Court must be particularly sensitive

in responses to evidence tending to rebut the presumption that the child's best interest will be protected by an authorized petitioner in a paternity suit especially when the child's best interest was not adequately protected in the prior suit. *Id.* Wanda does not want to determine the true biological father and the attorney ad litem failed to protect these interests of the children. Truth is thus hidden by actions of those who represent the boys, save and except, Morgan, who seeks to set aside the findings of paternity and to establish paternity in subsequent proceedings.

Texas Supreme Court has stated *In the Interest of J.W.T.*, 872 SW2d 189 (Tx. 1995) that the children should not be denied the right of knowing their biological father, their genetic history, the right of inheritance, or any legal rights to which the children may be entitled by the defining of the biological father and that the biological mother should not be the one to determine the definition of the family and who the biological father of the children is to be. Morgan's minor boys, are entitled to the same access to the Courts to determine paternity and to genetic information as any other individual whether they be adopted or illegitimate children.

Section 160.007 of the Texas Family Code (Pet. App. at 46a) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Morgan's children have been singled out as a class, namely children of a marriage where paternity has not been litigated. These children are denied access to the court's in order to determine the genetic history or other legal rights attended to paternity determination. Section 160.007 does not provide any safeguards that the child's present, future legal rights are adequately protected at the time the divorce decree was entered adjudicating Morgan as the biological father. Such children are being discriminated against. The Equal Protection Clause of the United States Constitution must guarantee equal rights to children born of the marriage as those children not born of the marriage.

CONCLUSION

The disparity in rulings by Supreme Court's of other states and the denial of the right of putative father to introduce DNA evidence to set aside a paternity judgment based upon fraud and deceit in violation of the Fourteenth Amendment to the United States Constitution is of such social significance that a Writ of Certiorari must be granted. Writ must additionally be granted in order to protect all children born of a marriage wherein the father is not the biological father of such children to insure that such children may preserve their genetic history, inheritance and rights derived from the biological father.

Respectfully submitted,

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